Wan Muhamad Ibrisam bin Wan Ibrahim & Ors v Opal Pyramid Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03–107 OF 2007
SURIYADI, RAUS SHARIF AND ZAINUN ALI JJCA
2 JULY 2008

Civil Procedure — Costs — Security for costs — Whether plaintiff ought to provide security for costs — Test for whether plaintiff ought to provide security for costs — Companies Act 1965 s 351

The plaintiff/respondent had sued the defendants/appellants for a breach of contract. The four appellants with the exception of the fifth defendant ('Sateras'), pending the main suit sought security for cost for the sum of RM75,000 against the respondent. Sateras was undergoing a restructuring scheme under s 176 of the Companies Act 1965 ('the Act'). The fourth appellant had entered into a definitive agreement wherein on completion of the restructure of Sateras, it was supposed to be taken over by the fourth appellant. The respondent, which was a dormant company with a paid-up capital of RM2, was created as a special purpose vehicle ('SPV') to facilitate a takeover exercise. The restructure scheme failed when the Sateras' petition to have the scheme approved was dismissed by the high court and later confirmed by the appellate courts. As a consequence of this failure to obtain the sanction, the appellants terminated the definitive agreement. Sateras filed a suit and ex parte interlocutory injunctions against the appellants, purposefully to restrain the termination of the definitive agreement. The senior assistant registrar allowed the first to the fourth defendants' application for security for cost for RM75,000. The High Court judge allowed the appeal stating that a party applying for security should be allowed to succeed only if on a scrutiny of his opponent's case as a whole it could reasonably be concluded the claim was so weak that the likelihood of failure was predictable.

Held, allowing the appeal with costs:

(1) By virtue of s 351 of the Act, the court statutorily may entertain the application if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. Nothing was mentioned of the

weaknesses of the plaintiff's case. The application of discretion, if security for costs is to be granted, therefore is subject to credible testimony ie the source of the reason that the plaintiff will be unable to pay the costs of a successful defendant (*Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, referred) (see paras 12 & 16).

(2) Based on the evidence adduced on the facts, the court found that the respondent would certainly fail to pay up if costs were ordered against it. The court also found that the learned judge had failed to consider the relevant factors which were irrebuttable of its inability to pay the appellants in the event of the suit's dismissal. Unless security for costs were ordered against the respondent the stifling oppression would shift to the appellants (see para 20).

[Bahasa Malaysia summary

Plaintif/responden telah menyaman defendan-defendan untuk kemungkiran kontrak. Keempat-empat perayu kecuali defendan kelima ('Sateras'), sementara menunggu guaman utama, memohon jaminan kos sebanyak RM75,000 terhadap responden. Sateras sedang melalui skim penstrukturan semula di bawah s 176 Akta Syarikat 1965 ('Akta tersebut'). Perayu keempat telah memasuki perjanjian muktamad di mana selepas selesai penstrukturan Sateras, ia sepatutnya diambil alih oleh perayu keempat. Responden yang merupakan syarikat yang dorman dengan modal berbayar sebanyak RM2, ditubuhkan sebagai 'special purpose vehicle' ('SPV') untuk memudahkan pelaksanaan pengambilalihan. Skim penstrukturan semula gagal apabila petisyen Sateras untuk kelulusan skim tersebut ditolak oleh Mahkamah Tinggi dan kemudian disahkan oleh mahkamah-mahkamah rayuan. Akibat daripada kegagalan untuk memperoleh persetujuan, perayu-perayu membatalkan perjanjian muktamad. Sateras memfailkan guaman dan injunksi interlokutori ex parte terhadap perayu-perayu, bertujuan untuk menghalang pembatalan perjanjian muktamad. Penolong kanan pendaftar membenarkan permohonan defendan-defendan pertama hingga keempat untuk jaminan kos sebanyak RM75,000. Hakim Mahkamah Tinggi membenarkan rayuan dengan menyatakan bahawa pihak yang memohon untuk jaminan sepatutnya dibenarkan untuk berjaya hanya jika atas penelitian kes penentangnya secara keseluruhan ia boleh secara munasabah disimpulkan bahawa tuntutan tersebut adalah amat lemah sehingga kemungkinan ia gagal adalah boleh dijangka.

Diputuskan, membenarkan rayuan dengan kos:

(1) Melalui s 351 Akta tersebut, mahkamah boleh secara statut melayan permohonan tersebut jika ia jelas melalui keterangan yang boleh

dipercayai bahawa terdapat alasan untuk mempercayai bahawa syarikat tersebut tidak boleh membayar. Tidak ada apa-apa yang dinyatakan mengenai kelemahan kes plaintif. Penggunaan budi bicara, jika jaminan kos akan diberikan, oleh itu tertakluk kepada keterangan yang boleh dipercayai iaitu punca alasan bahawa plaintif tidak boleh membayar kos kepada defendan yang berjaya (*Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, dirujuk) (lihat perenggan 12 & 16).

(2) Berdasarkan keterangan yang dikemukakan di atas fakta, mahkamah mendapati bahawa responden akan pasti gagal membayar jika kos diperintahkan terhadapnya. Mahkamah juga mendapati bahawa hakim yang bijaksana gagal untuk mempertimbangkan faktor-faktor relevan yang tidak boleh dipatahkan tentang ketidakbolehan membayar kepada perayu-perayu jika guaman ditolak. Kecuali jaminan kos diperintahkan terhadap responden, penindasan yang menyekat akan beralih kepada perayu-perayu (lihat perenggan 20).]

Notes

For cases on security for costs, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2083–2122.

Cases referred to

Kevorkian v Burney (No 2) [1937] 4 All ER 468 (refd)
Pearson & Anor v Naydler & Ors [1977] 3 All ER 531 (refd)
Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273 (refd)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649 (refd)

Legislation referred to

Companies Act 1965 ss 176, 351
Companies Act 1948 [UK] s 447
Courts of Judicature Act 1964 s 44

Appeal from: Suit No D8–22–981 of 2005 (High Court, Kuala Lumpur)

Adam Abdullah (S Maniarasan with him) (Adam Abdullah & Mani) for the appellant.
JT Sambathan (Joshua Sambathan) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The appeal before us was allowed with costs whereupon the High Court's decision was set aside. Pursuant to this order the senior assistant registrar's order allowing the first to the fourth defendants' ('appellants') application for security for costs was reinstated. The only difference was that the sum of RM75,000 was varied to RM40,000.

A **[2]** We now touch on the background of this appeal. The plaintiff ('respondent') had sued Wan Muhamad Ibrisam bin Wan Ibrahim, Tuan Haji Mohd Salleh bin Zakaria, Said @ Shuaib bin Bakar, Salwan Corporation Bhd and Sateras Resources (M) Bhd (respectively the first until fifth defendants) for a breach of contract. On 24 August 2005, the four appellants with the
B exception of the fifth defendant ('Sateras'), pending the main suit, filed a summons-in-chambers seeking security for cost for the sum of RM75,000 against the respondent. As said above, before the senior assistant registrar, the appellants succeeded and the full sum of RM75,000 sought for was granted as security for costs. Dissatisfied with that order, the respondent appealed to
C the judge in chambers and on 6 June 2007 successfully overturned the earlier order. It was then the turn of the appellants to appeal to the Court of Appeal hence our involvement.

D **[3]** To appreciate the matter more comprehensively, a need arises for us to lay down the antecedents as well as the factual matrix of this case. Sateras was undergoing a restructuring scheme under s 176 of the Companies Act 1965. In a word it was classifid as a PN4 company by Bursa Malaysia. Prior to this suit the fourth appellant had entered into a definitive agreement dated 9 May
E 2003, wherein on completion of the restructure of Sateras, it was supposed to be taken over by the fourth appellant. In anticipation of the take over exercise between the fourth appellant and Sateras, the respondent was established on 15 April 2003. As provided for in the agreement, Sateras would become the wholly owned company of the fourth appellant, thereafter
F followed up by a disposal of Sateras to the respondent for RM1. The respondent, which was a dormant company with a paid-up capital of RM2, thus was merely created as a special purpose vehicle ('SPV') to facilitate the takeover exercise. From these facts so far adduced, without prejudging the matter conclusively, in the event the scheme of restructure were to fail the
G definitive agreement would be functionless and the respondent redundant. The learned judge had not missed this point regarding the function factor and the respondent's poverty when he said:

> It is clear that all the defendants knew right from the start that the plaintiff was a
H company which was set up for a purpose of taking over the business of the fifth defendant in the event that the s 176 scheme of arrangement was successful. A company of this nature is not expected to carry a large asset — its *principal objective being merely to take over the fifth defendant business.*

I **[4]** The following facts were not denied in that the restructure scheme failed when the Sateras' petition to have the scheme approved was dismissed by the High Court on 31 January 2005. The appeal to the Court of Appeal was also struck out on 15 June 2005. Leave was also applied for in order to appeal to the Federal Court but was unanimously dismissed on 26 September

2005. As a consequence of this failure to obtain the sanction by 31 March 2005, the appellants terminated the definitive agreement on 1 April 2005. A

[5] This termination of the definitive agreement did not go down too well with Sateras, and it filed a suit ie, D6–22–465 of 2005 and ex parte interlocutory injunctions against the appellants, purposefully to restrain the termination of the definitive agreement. On 1 August 2005 the ex parte injunctions were dissolved and the inter partes applications were dismissed with costs. On 11 July 2005 it was the turn of the respondent to file this suit, ie D8–22–981 of 2005. It even applied for interlocutory injunctions against the appellants in similar terms as in D6–22–465 of 2005 but likewise failed on 21 September 2005. B C

[6] The respondent's main contention in taking up the principal action against the appellants, amongst others included the plea that the notice of termination issued by the fourth appellant's solicitor was unlawful, void and premature. It alleged that it should not have been issued by the fourth appellant's solicitor, Messrs Adam Abdullah & Mani, as one of their partners ie S Maniarasan at the material date of its issuance was a director in the fourth appellant company and also a major shareholder in Sateras. In a nutshell, with the existence of that conflict of interest, the firm should have discharged itself from representing all four appellants. D E

[7] The appellants had contended in the statement of defence that the respondent's claim was not bona fide, and was doomed to fail, let alone the issues raised were identical with the issues raised in Suit No D6–22–465 of 2005 commenced by Sateras against the appellants. As stated above in that suit Sateras had failed in its action. Further, the respondent, indisputably a dormant private limited company, with a paid up capital of RM2 was without locus standi to take up the matter. I could not help but observe that the definitive agreement was only between Sateras and the fourth appellant, with the respondent a mere term in the agreement. F G

[8] We now touch on the relevant portions of the learned judge's grounds. He had openly admitted that the respondent was set up for the purpose of taking over the business of Sateras after sanction was obtained. He agreed too that a company of this nature was not expected to carry a large asset. He opined that the failure to obtain sanction, despite the highest court in the land having confirmed the High Court's refusal, was of no impediment to the suit. It was merely an element in the equation and would not necessarily be the factor that would determine the respondent's claim. The success of the suit should be determined by perusing the four corners of the agreement and thereon decide whether the termination was lawful or otherwise. H I

[9] The learned judge thenceforth had made the following remarks when he stated:

> *A party* applying for security should be allowed to succeed *only* if on a scrutiny of his opponent's case as a whole it can *reasonably be concluded the claim* is so weak that the *likelihood of failure* is predictable; and if allowed to proceed for trial would cause the applicant to lose on costs which he may not be able to recover.

[10] The above statement certainly is so far removed from the legislated ingredients of s 351 of the Companies Act 1965 which confines applicants to the defendants. Only when the latter has filed a counterclaim may a plaintiff allude to this section. For other situations, say in an appeal to the Court of Appeal, under s 44 of the Courts of Judicature Act 1964 to prevent injustice, the court may order security for costs against a party, pending the disposal of the matter before it. The selective precondition of s 351 is not found in s 44 of the Courts of Judicature Act 1964.

[11] Further, the learned judge reasoned that security for costs should be allowed if it can reasonably be concluded that the claim is so weak that the likelihood of failure is predictable. To do that the judge will have to go through the processes of some preliminary hearing on the plaintiff's case; if it were so weak the plaintiff's case should be struck out. As the learned judge had said 'only' surely it is mandated that the judge must sift the evidence. Interestingly enough, he failed to do that here, in order to gauge the strength of the plaintiff's case. Lastly it gives the impression that only if the plaintiff's case were doomed to failure would security for costs be given. Any other reason will be unacceptable in an application of this nature. Even the assertion that the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal in the country will not be good ground to grant security for costs. Surely the views of the learned judge have militated against the demands of the Legislature?

Let us sift the material before us, and see whether there will be great likelihood of failure of the respondent's case by collating all the factors:

(i) want of bona fide action:

(a) the definitive agreement under consideration in the suit has no leg to stand on as the scheme has collapsed in its entirety; and

(b) the dismissed suit of D8–22–981 of 2005 was identical with the current suit; and

(ii) the respondent has no locus standi to file the suit let alone on behalf of anyone.

[12] With every respect to the learned judge, the view held by him seemed to have totally missed the point as promulgated in s 351 of the Companies Act 1965. This provision reads:

> 351 Security for costs.
>
> (1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

[13] As legislated above, a defendant in certain cases may ask for an order to compel the plaintiff to give security for costs of the action, but subject to the preconditions of the above provision. How the discretion is applied by the presiding judge very much depends on the material before him. From precedents, security for costs may be prayed for, eg as mentioned earlier, where the plaintiff is ordinarily resident abroad, and has no substantial property, real or personal in the country or for some good reasons (see *Kevorkian v Burney (No 2)* [1937] 4 All ER 468). It will be very costly and debilitating to expect the successful defendant to go to the plaintiff's country merely to recoup his costs there. Imagine his consternation if after successfully tracking the plaintiff he discovers that the latter is without any asset.

[14] Under British law under s 447 of the Companies Act 1948, which is in pari materia with s 351 of the Malaysian Companies Act 1965, where 'the sole plaintiff is a limited company and its financial condition brings it within s 447, the court has the discretionary power to order it to give security for costs' (*Pearson & Anor v Naydler & Ors* [1977] 3 All ER 531; Odgers on *Pleading and Practice* by GF Harwood at p 266). Section 447 reads as follows:

> Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until security is given.

[15] In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 Lord Denning MR had succinctly said:

> If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances...

Lawton LJ further approved:

> I agree with Lord Denning MR that the effect of s 447 is that once it is established by credible evidence that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence, the court has a discretion, and that discretion ought not to be hampered by any special rules or regulations, nor ought it to be put into a straitjacket by considerations of burden of proof. It is a discretion which the court will exercise having regard to all the circumstances of the case.

[16] Bottom-line, by virtue of s 351, the court here statutorily may entertain the application if *it appears by credible testimony that there is reason to believe that the company will be unable to pay* the costs of the defendant if successful in his defence. Nothing is mentioned of the weaknesses of the plaintiff's case. The application of discretion, if security for costs is to be granted, therefore is subject to credible testimony ie, the source of the reason that the plaintiff will be unable to pay the costs of a successful defendant (*Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649).

[17] It is quite clear from all the above authorities that the concept of likelihood of winning has no place at all in an application for security for costs before a judge. The prerequisite is that there is credible testimony before the judge and that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendants if they are successful in their defence. The discretion ought not to be hampered by any new formulated concepts that tend to import inhibitive demands into s 351 of the Companies Act 1965.

[18] We now briefly sift the evidence and conclude whether there is reason to believe that the respondent will be unable to pay the appellants in the event of their success.

[19] The learned judge had openly admitted that the respondent was a company that did not carry a large asset. He fell short of admitting that the respondent, a dormant RM2 company, was impecunious. In fact currently this shell company which has no business address and without any assets suffers liabilities of up to RM3,401. Apart from this appeal where the panel had ordered costs, we were not unmindful of the earlier High Court orders dismissing the respondent's application with costs for interlocutory injunctions against the appellants on 21 September 2005. From the records

and submission of the appellants two other interlocutory applications were also made by the respondent and eventually dismissed with costs. And all this without taking into account the costs from the impending full blown trial and any probable follow up appeals.

[20] It was our finding that the respondent would certainly fail to pay up if costs were ordered against it. We also found that the learned judge had failed to consider the relevant factors which were irrebuttable of its inability to pay the appellants in the event of the suit's dismissal. Unless security for costs were ordered against the respondent the stifling oppression would shift to the appellants. Based on the above reasons we had allowed the appeal with costs and thereupon set aside the High Court order. The deposit was ordered to be refunded to the appellants. The senior assistant registrar's order was reinstated but varied to RM40,000 with this sum to be deposited into court one month before the full trial.

Appeal allowed with costs.

Reported by Sally Kee